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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 668

LOCAL 175 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND EARL W. BURNETTE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court on petitioners' motion to dismiss the indictment (R. 21a) [1] is reported in 116 F. Supp. 509. The opinion of the court of appeals (Pet. App. 9-12) has not yet been reported.

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[1] "R" references are to the appendix filed by petitioners in the court of appeals. "RR" references are to the appendix filed by the Government in the court below.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1955 (Pet. App. 8). The petition for a writ of certiorari was filed on March 21, 1955. Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the allegations of the indictment are sufficient to charge violation of the Sherman Act.
2. Whether, under the facts charged and proved, petitioners are within the immunity conferred by Section 6 of the Clayton Act.
3. Whether there was sufficient evidence to support petitioners' convictions.

STATUTES INVOLVED

Section 1 of the Sherman Act (26 Stat. 209, as amended by the Act of August 17, 1937, 50 Stat. 693, 15 U. S. C. 1) provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.

Section 6 of the Clayton Act (38 Stat. 731, 15 U. S. C. 17) provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

STATEMENT

An indictment returned in July 1953 charged the defendants with conspiring to restrain interstate commerce in electrical equipment by suppressing competition in the sale and installation of such equipment in the Chattanooga area of Tennessee,[2] in violation of Section 1 of the Sherman Act. The defendants named include the Chattanooga Chapter, National Electrical Contractors Association, Inc., a trade association composed of electrical contractors operating in the Chattanooga area; various contractor members of this Association; Local No. 175, International Brotherhood of Electrical Workers ("petitioner Union"); and Earl

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[2] As defined in the indictment, the Chattanooga area means the City of Chattanooga and a 30-mile radius therefrom.

W. Burnette, business agent of Local 175. The last two defendants are the present petitioners.

All of the defendants except the two petitioners filed pleas of *nolo contendere*. After the district court had denied petitioners' motion to dismiss, a jury returned a verdict of guilty against petitioners. Following entry of judgment imposing a fine of $3,000 on petitioner Union and a fine of $1,000 on petitioner Burnette, the court of appeals, in a *per curiam* opinion, unanimously affirmed the district court's judgment.

The pertinent allegations of the indictment are as follows:[3]

Over 90% of the electrical equipment sold and installed in the Chattanooga area is sold and installed by electrical contractors, and more than 75% of said equipment is sold and installed by members of the defendant Association. Of the electrical equipment sold and installed in the Chattanooga area, over 75% is manufactured outside the State of Tennessee and shipped to the area for sale and installation therein. The Chattanooga-area contractors order directly from out-of-state manufacturers a substantial quantity of the equipment which they sell and install, and such equipment is shipped directly to the contractors' places of business or to the site of installation. The contractors are conduits through which the equipment produced in other states is sold and dis-

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[3] See also the court of appeals' summary of these allegations (Pet. App. 10-11).

tributed to consumers in the Chattanooga area, and the equipment "flows in a continuous, uninterrupted stream from its points of origin in States other than Tennessee to its places of installation and use within the Chattanooga area." Petitioner Union supplies the skilled labor used in installing more than 90% of the electrical equipment sold and installed in this area. R. 7a-8a.

Pursuant to the conspiracy, Association members who intend to bid for a job involving sale and installation of electrical equipment in the Chattanooga area register with the Association a notice of intent to bid. Those who have registered attempt to agree upon and to designate the one who will be the low bidder, and the other members either do not bid or submit bids at higher figures. In the event of failure to agree upon the choice of a low bidder, the matter is referred to a Grievance Committee composed of officers and directors of the Association, and the Grievance Committee's decision is final. Any member who fails to comply with the foregoing procedure is subject to a fine. No non-member is to be permitted to perform successfully any job on which an Association member has registered an intent to bid. R. 9a-10a.

It is also a part of the conspiracy that petitioner Union refuse to supply union labor (or supply only incompetent labor) for any job on which an Association member has registered an intent to bid, unless the job is awarded to the member selected and designated as the low bidder; that

petitioner Union refuse to enter into labor contracts with non-Association contractors unless they agree not to compete with Association members on jobs desired by the latter; and that petitioner Union picket any job on which electrical contracting work is done by labor not supplied by petitioner Union, and place on its "unfair list" any general contractor or other awarding authority who awards a contract to any electrical contractor in the Chattanooga area using labor not supplied by petitioner Union. R. 10a-11a.

ARGUMENT

1. On the question of whether the indictment sets forth a restraint of commerce which is interstate, petitioners concede that, as held by the court below (Pet. App. 11-12), *United States* v. *Employing Plasterers Assn.*, 347 U. S. 186, and *United States* v. *Employing Lathers Assn.*, 347 U. S. 198, are controlling. Petitioners' sole contention (Pet. 4) is that these decisions are in "conflict" with seven prior decisions, three by district courts,[4] two by courts of appeals,[5] and two by this Court.[6] Plainly no showing is thereby made that

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[4] *Marienelli* v. *United Booking Offices*, 227 Fed. 165 (S.D. N.Y.); *United States* v. *San Francisco Electrical Contractors Assn.*, 57 F. Supp. 57 (N.D. Cal.); *United States* v. *Greater Kansas City Chapter, National Electrical Contractors Assn.*, 82 F. Supp. 147 (W.D. Mo.).

[5] *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454 (C.A. 8); *Lumber Products Assn.* v. *United States*, 144 F. 2d 546 (C.A. 9), reversed *sub nomine United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395.

[6] *Hopkins* v. *United States*, 171 U.S. 578; *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469.

the decision below is in conflict with an applicable decision of this Court. Furthermore, the excerpts from the opinions in the *Hopkins* and *Apex Hosiery* cases which petitioners quote (Pet. App. 5, 14) are in no respect inconsistent with the Court's recent holding in *Employing Plasterers Assn.* and *Employing Lathers Assn.*[7]

2. Petitioners recognize that, under the decisions of this Court dealing with the application of the Sherman Act to labor unions, they are not within any immunity conferred by the Clayton Act. When labor unions "aid and abet manufacturers and traders in violating the Sherman Act", they thereby violate that Act (*Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797, 810), and when they thus act jointly with a non-labor group, Section 6 of the Clayton Act does not immunize their conduct (*idem*, p. 808). See also *Employing Plasterers Assn.* case, *supra*, at page 190. Petitioners apparently intend to suggest that this Court should reverse its settled construction as to the Sherman Act's application to labor unions, but they advance no reason for doing so.

3. The jury, the district court, and the court of appeals have found the evidence sufficient for conviction of petitioners. Under the two-court rule, this Court will not re-examine conflicting testimony in the absence of a very exceptional showing of error. *United States* v. *Johnson*, 319 U. S. 503, 518; *Comstock* v. *Group of Investors*, 335 U. S.

[7] It is also apparent, although there is no need to discuss the point, that at least several of the lower court decisions cited are readily distinguishable on their facts.

211, 214. In the instant case, petitioners make no showing whatever, resting simply on the bare assertion that the Government's evidence was insufficient to convict.[8]

[8] The Court of appeals observed (Pet. App. 12) that "the evidence respecting the contractors John Sliger, Joe Sliger, Curtis Electric Co., City Electric Co., Drinnon and Lewis, and Hagaman Electric Co., with the inferences favorable to the Government reasonably and justifiably to be drawn therefrom, strongly supported the Government's case." In view of the concurrent holdings below and petitioners' failure to advance their claim with particularity, we have not attempted to summarize the evidence adverse to petitioners. For purposes of illustrating the kind of testimony developed in the Government's case, we respectfully refer the Court to portions of the testimony of John and Joe Sliger (RR. 50-61, 67-74) and of H. G. Kent (RR. 41-43). The Sligers were Chattanooga electrical contractors who, when they refused to go along with the conspiracy, were forced out of business by being denied access to competent labor. Kent was a partner in Hagaman Electric Co., an out-of-town company, which was compelled to withdraw its bids on Chattanooga work by petitioners' threats to foment strikes and to see to it that the company's union contract would be lifted. As the court of appeals' opinion correctly indicates, these examples might be multiplied. See, generally, RR. 1-143.

CONCLUSION

The decision below correctly applies decisions of this Court which clearly are controlling, and the case presents no substantial question of law. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL, 1955.

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